



S.A. No. 1151 of 2009

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

DATED : 03.09.2024

CORAM

**THE HONOURABLE MRS. JUSTICE T.V.THAMILSELVI**

S.A. No.1151 of 2009

and

M.P.No. 1 of 2009 & M.P. No.1 of 2013

1. M.G.Baskaran  
M.G.Srinivasan (deceased)

2. M.G.Sampath  
3. G.Balamani  
4. S.Venkatesan  
5. Amsa  
6. Suresh  
7. Devi  
8. Jayanthi  
9. Rathi

... Appellants

Versus

1. Kasturi  
2. Bharathi

... Respondents

**Prayer:-** Second Appeal has been filed under Section 100 C.P.C., against the judgment and decree dated 10.11.2008 made in A.S.No. 481 of 2006 on



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the file of the IV Fast Track Court, Chennai reversing the judgment and decree dated 15.10.2003 made in O.S.No.1014 of 1998 on the file of VII Asst. City Civil Judge, Chennai.

For Appellants : Mr.P.Gururaj

For Respondents : No appearance

### **JUDGEMENT**

The appellants, who are plaintiffs have filed the suit for the relief of mandatory injunction against the respondents/defendants before the trial court in O.S. No. 1014 of 1998 on the file of VII Asst. City Civil Judge, Chennai and the same was decreed in favour of plaintiffs. Against which, the defendants preferred an appeal in A.S.No.481 of 2006 on the file of IV Fast Track Court at Chennai and the same was allowed dismissing the suit. Now, challenging the reversal findings of courts below, the plaintiffs preferred this Second Appeal and the same was admitted on the following substantial question of law :-

- (1) Whether suits for bare injunction without the relief of declaration in respect of the common passage is maintainable or



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not, while the title to the suit common passage is not in dispute?

(2) Whether the non-relying of Exhibit A2 and A3, being the certified copy of the document relating to the suit property issued by the Sub-Registration department by the lower appellate court is proper or not?

(3) Whether a co-owner can put up an unauthorised construction in the common passage is not absolutely owned by the co-owner?

2. For the sake of convenience, the parties are denoted as per the ranking in the suit.

3. Before the trial court, the appellants/plaintiffs filed a suit for mandatory injunction directing the respondents/defendants to remove unauthorised construction as there is an unauthorised construction put up by them in a common passage and a permanent injunction not to use the common passage marked in 'red' colour in the sketch including the 'yellow colour' in the common passage so as to reach the premises bearing doo Nos.31 and 33, Thalayeri Street, West Mambalam, Chennai from Govindan



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Road and morefully described as Item Nos.1 and 2 in the plaint schedule.

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4. The contention of plaintiff is that based upon Ex.A2, the plaintiff's father purchased the property from his original owner Shanmuga naicker in the year of 1947. Through Ex.A3, the defendant's husband purchased the property in the year of 1997. The original owner purchased the property through Ex.A1 in the year of 1946. While purchasing the property, 3 ft. common passage was given to reach common well. The husband of 1<sup>st</sup> defendant purchased the property from the same vendor through Ex.A3 in the year of 1967. Thereafter, they caused interference in the plaintiffs enjoyment in respect of using common pathway. Further, they have also constructed a stair case in the common passage and also not permitted to use the common well. Hence, the plaintiffs approached the court for the relief of mandatory injunction and permanent injunction to remove unauthorised construction in the common pathway as well as not to cause interference in using common passage as well as common well.

5. It is further contended that though the original sale deeds were not filed on the side of plaintiffs, they have produced the certified copy of sale deeds and the same were marked as Ex.A2, Ex.A3 and Ex.A4. Based on



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that, the trial court considered that at the time of purchase in the year of 1947, the plaintiffs were given right to use the common passage as well as common well, in which the defendants having put up construction, which needs interference. Furthermore, the original vendor, who purchased the property through Ex.A1 had given common right to both plaintiff and the 1<sup>st</sup> defendant's husband Duraisamy naicker. Accordingly, the suit was decreed giving a direction to remove the unauthorised construction. Challenging the said findings, the defendants preferred an appeal in A.S.No.481 of 2006 before the IV Fast Track Court, Chennai, wherein the first appellate judge independently analysed the evidence on record and elaborately discussed about the property description, finally made an observation that on perusal of Ex.A1 parent document, he was not able to find out any common passage, at the same time, while selling the property to 1<sup>st</sup> defendant through Ex.A3 a common passage was sold, but only the said common passage was shown as one of the boundary. Therefore, the alleged passage leading to the Well is excluded in Ex.A3. Hence, the plaintiffs, by virtue of sale deeds relied by them, have no right to claim that it is a common passage.

6. Admittedly, from the common vendor, the plaintiffs' father as well



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as 1<sup>st</sup> defendant's husband purchased the property. On perusal of sale deeds, Shanmuga Naicker, original owner purchased the property in the year of 1946 through Ex.A1 sale deed. Thereafter, he sold the property to plaintiffs' father in the year 1947 through Ex.A2. At that time, he gave a common passage to reach common well along with other rights. Thereafter, the 1<sup>st</sup> defendant's husband purchased the property in the year of 1997 through Ex.A3 from one Annammal, who is wife of Shanmuga Naicker, original owner with the same right of common passage to reach the common well and thereafter, Well is also allotted to 1<sup>st</sup> defendant, thereby both of the documents reveal that the plaintiffs' father and 1<sup>st</sup> defendant's husband purchased the property from a common owner and both were given right to use the common passage as well as given half share equally in the said Well. As the original sale deeds were not filed, the defendants have raised strong objections in respect of purchase of property. However, the parties are entitled to produce the certified copies of sale deeds, which are the public document. But, the first appellate court erroneously concludes that the plaintiffs are not entitled to any relief, since their father had purchased the property from the original owner as such is erroneous one and the same is



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liable to be set aside.

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7. When the property was purchased from a common vendor, he created a common passage and given the same to the subsequent purchaser through Ex.A2 and A3, but the courts below erroneously concludes that common passage is stilled by the defendants, as such is erroneous one. In the year of 1947, the right to use the common passage and common right to use the well was granted. Hence, the findings of the first appellate judge needs interference, since it is an erroneous finding.

8. Admittedly, no relief of declaration was prayed by the plaintiffs, however, the court is empowered to decide the right of the parties incidentally while granting the relief of injunction. As discussed above, the plaintiffs' father purchased the property in the year of 1947 along with common passage and with a right to use Well. Therefore, though there is no relief of declaration, the plaintiffs incidentally proved their right and title in respect of using the said passage. So, they are entitled for mandatory injunction. Accordingly, the question of law (1) is answered.

9. As discussed above, the subject property in dispute is to be decided,



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since because both parties have not known about the purchase made by each other. The certified copies of Sale deeds are public documents, they are entitled to file the same. Therefore, the findings of first appellant judge holding that certified copies of sale deeds cannot be considered as such is erroneous one and the same is liable to be set aside. Accordingly, the question of law (2) is answered.

10. Since because the common passage is given to reach the Well, the defendants having put up an unauthorised construction, which needs interference. Accordingly, the question of law (3) is answered.

11. With the aforesaid observation, this Second Appeal is allowed and the findings given by the first appellate judge in A.S.No.481 of 2006 is set aside and the findings of the trial court in O.S. No. 1014 of 1998 is confirmed and the suit is decreed as prayed for. No costs. Consequently, the connected Miscellaneous Petition is closed.

**03.09.2024**

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To  
IV Fast Track Court, Chennai.



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**T.V.THAMILSELVI, J.**

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